IN THE HIGH COURT OF JUDICATURE AT BOMBAY

O.O.C.J.

ARBITRATION PETITION NO.544 OF 2003

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Harinarayan Bajaj ...Petitioner

v/s.

Sharedeak Financial Consultants Pvt.Ltd. ...Respondent

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Mr.Aspi Chinoy with Mr.Ranjit Waghela i/b Dhru & Co. for the Petitioner.

Mr.Jayant Gaikwad i/b Ajay Khandhar & Co. for the Respondent.

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CORAM: D.K.DESHMUKH, J.

DATED: 27TH JUNE,2005

P.C.:

1. By this petition the Petitioner challenges the award made by the Arbitral Tribunal of the Bombay Stock Exchange. By that award the Arbitral Tribunal has directed the Petitioner to pay an amount of Rs.6,96,78,082.55 to the Respondent with interest.

2. The facts that are material and relevant for deciding this petition are that: . The Respondent is the stock-broker. The Petitioner is his client. The Respondent made a claim that at the instance of the Petitioner he had purchased some shares of Amar Raja Batteries Ltd. However, on the date of payment, payment was not made. Therefore, the claim was made for the price of the shares. One of the objections that was raised by the Petitioner to the claim that was submitted by the Respondent was that the Respondent cannot claim for price of the shares, because the Respondent is not in a position to deliver the shares, even if the Petitioner agrees to pay price of the shares. In these circumstances, on 21-2-2003 the Respondent filed an application before

the Arbitral Tribunal. The title of that application was "application for extending the credit to the Respondent for an amount of Rs.2,13,00,000/-". It was stated in that application that by letter dated 10-2-2003, the Respondent has been informed by the Stock Exchange that 3,85,510 shares out of 369980 shares were sold by the Stock Exchange and credit of the amount of Rs.2,22,00,000/- was realised by the Stock Exchange and that amount was credited to the account of the Respondent with the clearing house. It was stated that now, therefore, no shares are deliverable to the Petitioner and the credit of Rs.2,13,02,809/- should be given to the Petitioner and therefore the claim of the Respondent will stand reduced by Rs.2,13,02,809. It was stated that now the Petitioner is claiming an amount of Rs.7,37,72,000/-. A reply was filed to this application by the Petitioner. In the reply it was stated that as now the Respondent has also accepted that he is in no position to deliver the shares, he will be not be entitled to claim price of the shares which is the relief claimed by him in the the statement of claim. It was contended that, therefore, in order to claim damages for the alleged failure of the Petitioner to pay price of the shares

on due date, the Respondent will have to amend his statement of claim and claim a decree for damages. It was stated that only in case such an amendment is applied and is allowed by the arbitral tribunal, then the Respondent can submit his reply on merits. It is an admitted position that thereafter no application for amendment of the claim statement was made, no evidence was led and the award came to be passed. In the award the arbitral tribunal referred to the application filed by the Respondent, referred to above, in paragraph 5 and accepted his case and made direction for payment of damages.

3. The learned Counsel appearing for the Petitioner submits relying on the judgment of the Supreme Court in the case of M/s.Trojan & Co. v/s. R.M.N.N.Nagappa Chettiar, AIR 1953 SC, 235 that without carrying out amendment in the statement of claim, without pleading alternate case and also without praying for a decree, the arbitral tribunal was not justified in making the award for damages. It is further submitted that, if the Petitioner has committed breach of the contract, then the Respondent would be entitled to damages and the measure of the damages would be the loss suffered by the Respondent

on the date of the alleged breach of the contract. It is submitted that neither in the application submitted by the Respondent nor in the letter dated 10-2-2003, it is disclosed as to how the sale was held. Even the date of the sale is not disclosed. It is submitted that had the claim been amended making the claim on the basis of the letter dated 10-2-2003, then it was open to the Petitioner to contend that the price of the shares received in the sale cannot be considered as the proper price and the sale was not conducted properly. Had such contention been allowed to be raised, it is doubtful whether the arbitral tribunal would have had the jurisdiction to decide about the validity or otherwise of the alleged sale.

4. The Respondent is served and he is represented by a lawyer. The learned Counsel appearing for the Respondent did not argue the matter saying that he does not have instructions from the Respondent.

5. For this reason, this matter is being adjourned for last more than three months right from April, 2005 and hence I declined to adjourn the matter. I have heard the learned Counsel for the Petitioner. I

have also gone through the record. Perusal of the record shows that the claim was for price of the shares, which were alleged to have been purchased by the Respondent on behalf of the Petitioner. It is clear from the record that one of the defences raised by the Petitioner was that the Respondent is not entitled to claim the price of the shares because he is in no position to deliver the shares, even if the Petitioner pays price of the shares. The date on which, according to statement of claim, the Petitioner was liable to pay the price was 16th March, 2001. Perusal of the letter dated 10-2-2003 on the basis of which the Respondent made an application referred to above shows that the Stock Exchange extended the credit of Rs.9,18,27,641.30 to the Respondent in the month of March, 2001 and on his failure to pay back that amount within 90 days from the date of advance, the sale of the shares was held. The letter does not disclose the date on which the sale was made. The letter was written in the month of February, 2003, almost two years after the due date for payment. If the amount of damages was to be worked out on the basis of the sale conducted by the Stock Exchange, then obviously the Petitioner would be entitled to raise his objection in relation to the

sale. The Petitioner would have got that opportunity, had the Respondent amended his statement of claim and now made his claim for damages on the basis of the sale conducted by the Stock Exchange, but that was not done. The Supreme Court in its judgment in the case of M/s.Trojan & Co., referred to above, has observed thus in paragraph 22 as follows:-

> 22..... It is well settled that the decision of a case cannot be based on grounds outside the pleadings of the parties and it is the case pleaded that has to be found. Without an amendment of the plaint, the Court was not entitled to grant the relief not asked for and no prayer was ever made to amend the plaint so as to incorporate in it an alternative case. The allegations on which the plaintiff claimed relief in respect of these shares are clear and emphatic. There was no suggestion made in the plaint or even when its amendment was sought at one stage that the plaintiff in the alternative was entitled to this amount on the ground of failure of consideration. That being so, we see no

> valid grounds for entertaining the plaintiff's claim as based on failure of consideration on the case pleaded by him. In disagreement with the Courts below we hold that the plaintiff was wrongly granted a decree for the sum of Rs.6,762.80 in respect of the Associated Cement shares in this suit. Accounts settled could only be reopened on proper allegations.

6. It is clear from the observations of the Supreme Court quoted above that without the Petitioner pleading an alternate case of damages and praying for decree in those terms, the arbitral tribunal could not have made award for damages. It is further to be seen that in the same judgment the Supreme Court has observed that in the absence of any such circumstance the amount of loss, in case of breach of contract, can only be the difference between the price which was to be paid and the market price prevailing on the date of the breach. In the present case, perusal of the award as also the application on the basis of which the award has been made shows that no where the price prevailing

on the date of the breach has been considered or referred to. It is, thus, clear that the arbitral tribunal has not followed the proper procedure in making the award. Not fFollowing the proper procedure resulted in denying to the Petitioner an opportunity of being heard. Therefore, the award is clearly in breach of the principles of natural justice.

7. For all these reasons, therefore, the award impugned in the petition is set aside. The Respondent is directed to pay costs to the Petitioner, as incurred by the Petitioner.

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